# *Federal Insurance v. Executive Coach Luxury Travel, Inc.:* A Commentary and Its Impact

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### The Majority Opinion

In *Federal Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 2010-Ohio-6300, liability coverage was found for an independent contractor bus driver under the customer's policy of insurance. The facts of the case were important to the finding of coverage; those same facts will be important in determining the impact of the case.

Bluffton University contracted with Executive Coach, which provided a bus and driver, to transport the University's baseball team to Florida in March of 2007. The bus driver apparently mistook an exit ramp for another lane of travel and was unable to stop the bus at the top of the ramp. The bus went over the ramp and plunged to the highway below; the driver, his wife, and five Bluffton players were killed and many others were injured.

Before the trip the University's baseball coach was asked if one of Executive Coach's drivers who had driven the team to Florida before was acceptable; the coach agreed. The University coach claimed that he had authority to tell the bus driver to stop driving if he was driving dangerously, or to stop the bus for any reason, for a break or a meal, for example. Moreover, when the coach discovered that a DVD player was not working properly shortly after the trip had begun, he had the driver turn the bus around to go back to Executive Coach to get another bus with a functional DVD player. In the interim, however, the coach fixed the DVD player so they continued on their journey.

The University was covered by a primary auto policy issued by The Hartford Insurance Company, an umbrella policy issued by American Alternative Insurance Corporation, and an excess liability policy issued by Federal Insurance Company ("Federal"). The umbrella and excess policies incorporated the terms and conditions of the primary policy with Hartford, which defined an "insured" in the standard omnibus clause as follows: "[a]nyone else while using with your permission a covered 'auto' you own, hire, or borrow."

Several injured players and their estates sought coverage under the University's policies of insurance. The trial court and court of appeals held that there was no coverage because neither the driver nor Executive Coach qualified as an "insured"—the University did not own and had not "hired" the bus involved in the accident. Rather, the University had contracted with Executive Coach to provide transportation services in a vehicle leased by Executive Coach and driven by one of its employees. The Supreme Court of Ohio reversed.

Justice Paul Pfeiffer authored the majority opinion joined in by Chief Justice Eric Brown, then-Associate Justice Maureen O'Connor, and Judge Timothy Cannon of the Eleventh District Court of Appeals, sitting for Justice Robert Cupp. Justice Judith Ann Lanzinger concurred in judgment only. The majority held that the University's policies extended liability coverage to the bus driver because the driver was using with the University's permission a vehicle that the University hired. The court concluded that on its face the omnibus clause applied because the University hired the bus from Executive and granted permission to the driver to drive his employer's bus. The court found that whether the insurance company intended the clause to apply was immaterial because the language of the policy supported the conclusion that the driver was an insured. The court noted that it construes insurance policies liberally in favor of the insured and it construed the terms "hire" and "permission" in keeping with their common and ordinary definitions. The court was "not persuaded" that cases requiring possession and control over an auto should be the law of Ohio. The court dismissed those cases as "factually inapposite" because they involved the loading and hauling of construction equipment and materials, not the transportation of people. The majority concluded, though, that even if a possession and control test were applied, Bluffton hired the bus and coverage would be owed.

### The Dissenters and Federal's Motion for Reconsideration

Justices Evelyn Lundberg Stratton and Terrence O'Donnell dissented. They recognized that the majority's interpretation expands the scope of coverage beyond what

the parties to the insurance policy intended. Although the majority considered the parties' intent immaterial, the fundamental goal in interpreting policies is to ascertain the intent of the parties from reading the contract as a whole. Justices Lundberg Stratton and O'Donnell noted that the majority's decision effectively opens the door for similar claims under other scenarios because the omnibus clause is standard in many insurance policies. A taxi company, limousine company, bus company, and their drivers could rely on a customer's liability insurance to supplement their own coverage.

Federal filed a motion for reconsideration arguing that the policy should be construed in favor of the policyholder (Bluffton University), not the bus driver, who did not contract with, or pay premium to, the insurer for coverage. Moreover, Federal argued that the court applied the incorrect standard by not reading the policy language in context so as to give effect to the intent of the parties to the contract. Appended to the motion was a listing of cases (some where people were transported) from all fifty states where a possession and control test was applied. Federal cited *Westfield Ins. Co. v. Galatis,* 100 Ohio St. 3d 216, 2003-Ohio-5849, for the proposition that an insurance contract should not be strictly construed against the insurer where expanding coverage beyond a policyholder's needs will increase the policyholder's premiums. Also, Federal asserted that the opinion in this case would result in increased litigation, unanticipated exposures, widespread uncertainty, and higher premiums.

An *amicus curiae* brief urging reconsideration also was filed by the following interests: Ohio Insurance Institute, Association of Independent Colleges and Universities of Ohio, American Insurance Association, Ohio Chamber of Commerce, Ohio Manufacturer's Association, National Federation of Independent Businesses - Ohio, Ohio Counsel of Retail Merchants, Ohio State Medical Association, Ohio Hospital Association, and Ohio Society of CPAs. The amicus filing pointed out that the court had adopted a novel legal approach that enlarged an insurer's duties beyond defined legal limits and distorted the underlying risk calculation on which premiums are based. The decision bestowed coverage on an "insured" who was not a party to the insurance contract and paid no premium, contradicting the reasonable expectations of the insured and insurer alike. The amicus motion noted that the result reached in this case could harm both insurers and business enterprises, and could have a profound negative effect on Ohio businesses.

The Supreme Court overruled the motions for reconsideration without further opinion.

**Commentary and the Decision's Impact**

The majority opinion focused on the facts of the case, although perhaps the most compelling fact was left unsaid: there was insufficient insurance to cover the catastrophic claims. If there had been adequate insurance, this case probably never would have been brought.

The majority opinion concluded that the University gave the bus driver the right to operate his employer's bus — an odd construct, given that the University did not employ the driver or own the bus. Moreover, the independent contractor relationship between the University and Executive Coach (the employer of the driver) strongly suggested that the University had no right to control the bus driver. Federal argued that an interest in the result — where the bus goes — but not the manner or means of accomplishing the result, does not confer insurance coverage on the bus driver. Indeed, Federal argued that it made little sense to conclude that a customer could grant or deny a non-employee a right to operate a non-owned vehicle. The majority of the Supreme Court, however, was unpersuaded.

Because this decision is so new (the motion for reconsideration was denied on April 1, 2011) there has been little time to gauge its impact. Universities in Ohio, though, are concerned about their insurance limits being eroded by transportation providers seeking coverage under their policies. Insurers also are considering rewriting their policies.

One thing is certain: claimants in Ohio and elsewhere will seize upon this case where a liable transportation provider does not have sufficient insurance. In catastrophic losses, this decision will result in additional claims, suits, and declaratory judgment actions. Insureds and insurers alike will face unexpected and detrimental exposures. In the final analysis, there will be greater uncertainty because whether coverage exists may turn on the happenstance of a DVD player malfunctioning or a transportation provider asking its customer whether a driver is acceptable.

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